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IN THE COURT OF APPEALS OF INDIANA

JEFFREY DOWERS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0508-CR-815
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0408-FB-398

November 21, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Jeffrey Dowers (Dowers) appeals his convictions for criminal deviate conduct as a class B felony and child seduction as a class D felony, after a jury trial.

We affirm and remand.

ISSUES

1. Whether the trial court erred when it ruled that Dowers had failed to lay a proper foundation for impeaching the victim's testimony.

2. Whether Dowers' convictions for criminal deviate conduct and child seduction violate Indiana's constitutional provision against double jeopardy.

3. Whether the trial court erred when it sentenced Dowers.

FACTS

Dowers and his wife adopted K.D., born in March 1988, when she was 6-years-old. On July 16, 2004, then 16-year-old K.D. reported that between mid-May and July of 2004, Dowers forced her on four separate occasions to engage in inappropriate sexual acts with him. Specifically, she testified at trial that the first incident occurred in the hallway of the family home where Dowers forced her to her knees and made her fellate him while he rubbed her vagina. K.D. testified that the second incident occurred in Dowers' home office where he placed his hand under her shorts and rubbed her vagina. She testified that the third incident occurred in Dowers' bedroom where he again forced her to fellate him and he performed oral sex upon her. She testified that the fourth incident occurred in her bedroom where Dowers forced her to fellate him.

On August 16, 2004, Dowers was charged with Count 1, criminal deviate conduct, as a class B felony, and Count 2, child seduction, as class D felony. On June 23, 2005, the jury

trial commenced and it returned verdicts of guilty on both counts on June 27th. The trial court ordered a Pre-Sentence Investigation report (PSI) to be performed.

On July 18, 2005, the trial court conducted a sentencing hearing. After reviewing the PSI, the arguments of counsel, and evidence, the trial court sentenced Dowers as follows:

> On Count I, to the custody of the Indiana Department of Correction for a period of 10 years; Count II, to the custody of the Indiana Department of Correction for a period of 2 years, concurrent with count I, for a total sentence of 10 years, all of which shall be executed.

(App. 4). Dowers appeals his convictions and sentence. Additional facts will be provided below.

DECISION

1. Impeachment

On appeal, Dowers argues that he was "prevented from introducing extrinsic evidence of an inconsistent version of events [K.D.]" had given Detective McClain and, thus, was denied the opportunity to exercise his Sixth Amendment right to confront and cross-examine K.D. for the purpose of impeachment. We disagree.

The admission of evidence is left to the discretion of the trial court, and we reverse only for an abuse of that discretion. Maxwell v. State, 839 N.E.2d 1285 (Ind. Ct. App. 2005). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Id. at 1287. This court will also find that an abuse of discretion occurs when the trial court restricts the scope of cross-examination to the extent that such restriction has substantially affected the defendant's rights to examine the witness. Morrison v. State, 824 N.E.2d 734, 739 (Ind. Ct. App. 2005).

Indiana Evidence Rule 613(b) provides:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interest of justice otherwise require.

During cross-examination of K.D. regarding her statements to Detective Heather McClain, Dowers asked: "Why didn't you mention the incident [in] the hallway?" (Tr. 328). The following exchange occurred:

> A. Could you please tell me what you mean?
>
> Q. In all of the statements that we have here, a summary of your statements to Detective McClain, you make no reference to anything happening to you in the hallway of your home.
>
> A. Yes, I did.

(Tr. 329). This was the extent of Dowers' questioning of K.D. on this matter. Subsequently, Dowers on cross-examination of Detective McClain asked her:

> Q. . . . [K.D.] never told you of an incident where he allegedly molested her in the hallway of her home, did she?
>
> A. I believe she mentioned he exposed himself in the hallway.
>
> Q. Just exposed himself?

(Tr. 416). At that point, Detective McClain expressed that K.D's video-taped statement may have contained more detail about K.D.'s statement regarding what occurred in the hallway. The trial court granted a recess so that Detective McClain could view the taped statement. While she was absent viewing the statement, the attorneys argued on the record regarding Dowers' attempt to impeach K.D. through the testimony of Detective McClain. The State argued to the court:

> Mr. Lockwood [Defense Counsel] has so far asked Detective McClain very specific questions about the hallway incident and things along those lines. The problem is it's hearsay. It's not impeachment. Because the question he asked [K.D.] was and I wrote this down in quotes, you didn't tell Detective McClain anything about 'the incident in the hallway' and then the next question you didn't tell her about "anything happening in the hallway of the home". [sic] That was - - and we listened to the entire cross examination. That is the only reference Mr. Lockwood made during that cross examination to the incident in the hallway. So the problem is now that she did say something happened in the hallway of the home to Detective McClain and Mr. Lockwood's already listened to the testimony that she said in the statement that he exposed himself to her. I believe Detective McClain, just having reviewed the tape, testified that she said he rubbed it. I'm sorry, he had her rub his - - his penis and so now Mr. Lockwood has - - I mean, unfortunately, he was acting on good faith here but he's created a mess. Because he has improperly impeached the original witness with things that weren't actually said in the videotape.

(Tr. 421-422). Dowers' counsel responded:

> The point is that if this young lady has made statements to police officer describing what happened are different that what she testified to in trial, then I'm allowed to cross examine or impeach her overall credibility asking about what she had said before. These are inconsistent statements if she said he - - in trial, he pushed me down on my knees and made me commit fellatio on him and she doesn't mention that incident to the officer or if you want to stretch a point, she said that he exposed himself. I think the jury has the right to ponder why she would make different statements about things at different times.

(Tr. 423).

At the end of counsels' arguments, the trial court ruled that Lockwood's question to K.D. as to, "Why didn't [she] mention the incident [in] the hallway" to Detective McClain was in fact answered when K.D. responded that she had reported the hallway incident to Detective McClain; and, Detective McClain in her testimony corroborated that K.D. had reported the hallway incident to her. The trial court then held that because defense counsel had limited his questioning of K.D., and had failed to lay a proper foundation regarding any

inconsistent statement K.D. might have made, he forfeited the opportunity to question Detective McClain about the specifics of the hallway incident that K.D. had reported. See Evid. R. 613(b).

After the trial court ruled that Dowers had not laid a proper foundation to impeach K.D.'s testimony through the testimony of Detective McClain, Dowers then moved to recall K.D., this time as his own witness. The State objected and the trial court denied Dowers' request to recall K.D., ruling that the defense had its opportunity to cross-exam K.D. and, thus, had waived the right to recall her as its witness for the purpose of impeachment.

In summary, we find that during cross-examination, Dowers never asked about the specifics of what K.D. had reported to Detective McClain. The result being, Dowers never created a credibility issue regarding an inconsistent statement that K.D. might have made and testified to differently at trial. Pursuant to Indiana Evidence Rule 613(b), Dowers' failure to lay a proper foundation to impeach K.D. with a prior inconsistent statement, barred his use of testimony by Detective McClain for that purpose. We find that the trial court did not abuse its discretion when it did not allow Dowers to question Detective McClain regarding the content of what K.D. had reported to her. And, the trial court did not abuse its discretion when it did not allow Dowers to recall K.D. as his witness.

2. Double Jeopardy

Dowers argues that his convictions for both sexual deviate conduct as a class B felony and child seduction as a class D felony violates Indiana's bar against double jeopardy. He asserts that there is a reasonable possibility that the jury used the same evidence to convict

Dowers of both charges. We disagree.

Article 1, section 14 of the Indiana Constitution provides that, "[n]o person shall be put in jeopardy twice for the same offense." Its purpose is "to prevent the State from being able to proceed against a person twice for the same criminal transgression." Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999). When considering a double jeopardy claim under the "actual evidence test," "the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts." Id. at 53. Dowers must "demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense." Id.

The elements of criminal deviate conduct are: (A) a person who knowingly or intentionally causes another person to perform or submit to deviate sexual conduct, when (B) the other person is compelled by force or imminent threat of force. Ind. Code § 35-42-4-2. The elements of child seduction are: (A) a person who is at least 18 years of age; and (B) is the adoptive parent of a child at least sixteen (16) years of age but less than eighteen (18) years of age; engages with the child in sexual intercourse, deviate sexual conduct (as defined in Ind. Code 35-41-1-9), or any fondling or touching with the intent to arouse or satisfy the sexual desires of either the child or the adult. I.C. § 35-42-4-7.

The record in this case reveals that Dowers was charged with a single act of each offense. Yet, the jury heard testimony from K.D. of four separate encounters. She testified that in the hallway of the family home she "sucked" Dowers' penis under force. (Tr. 283).

She testified that on another day, in her father's bedroom, he performed oral sex on her and he had her perform oral sex on him. And finally, K.D. testified that the last occurrence between them was in her bedroom, where K.D. was forced to perform oral sex on Dowers. The jury heard testimony of at least three distinctive sexual acts that occurred on three separate days that satisfied the elements of both offenses charged. Because of the clear and distinctive nature of the testimony describing the sexual acts occurring on three separate days, we find that the jury did not use the same evidence to convict Dowers for both offenses. Thus, Dowers has failed to demonstrate that a reasonable possibility exists that the jury used the same evidentiary facts to support his convictions for both sexual deviate conduct and child seduction. We find no double jeopardy violation under Article 1, section 14.

3. Sentence

Dowers argues that he was erroneously sentenced because (a) the trial court sentenced Dowers to an enhanced sentence without identifying an aggravating factor, and (b) the trial court did not read 38 letters that were submitted by Dowers' friends, family, and co-workers.

(a) *Enhanced Sentence*

Sentencing decisions are generally within the trial court's discretion and will be reversed only for an abuse of discretion. Comer v. State, 839 N.E.2d 721, 725 (Ind. Ct. App. 2005), trans. denied. The presumptive sentence for a class D felony is one and one half-years, with not more than one and one-half years added for aggravating circumstances and

not more than one year subtracted for mitigating circumstances.[1] I.C. § 35-50-2-7.

Dowers was sentenced to two years for his D felony conviction of child seduction. Dowers argues that the trial court erred when it ordered an enhanced sentence but failed to identify any aggravating factors to support it.

On July 18, 2005, the trial court held a sentencing hearing. After hearing testimony and arguments of counsel, the trial court ordered "the defendant Count I, Criminal Deviate Conduct, class D felony to the Department of Corrections [sic] for ten . . . years and count II, Child Seduction, for two (2) years concurrent, all executed." (Tr. 582). The PSI identified as an aggravating factor that Dowers violated a position of trust. Mitigating factors that were identified were that Dowers had no prior criminal history and that he would likely respond well to probation or a short term of imprisonment.

In response to the lack of a specific statement by the trial court regarding its imposition of an enhanced sentence, the State asserted that pursuant to the current statute, a court is authorized to impose any sentence that is authorized by statute and permitted under the Constitution, and is no longer required to engage in a weighing of mitigating and aggravating factors. See I.C. § 35-38-1-7.1(d).

However, because this statutory provision was not effective until April 25, 2005, which was after Dowers had committed his offenses, it does not apply here. We choose to follow the lead of another panel of this court, which in Henderson v. State, 848 N.E.2d 341,

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[1] Between the date of Dowers' offenses and the date of sentencing, Indiana Code section 35-50-2-1.3 (2005) was amended to provide for an "advisory" rather than "presumptive" sentence. Another panel of this court

344 (Ind. Ct. App. 2006) held: "In a sentencing statement, a trial court must identify all significant aggravating and mitigating factors, explain why such factors were found, and balance the factors in arriving at the sentence." Accordingly, in order for the trial court to increase Dowers' sentence above the presumptive sentence, the trial court's sentencing statement must have (1) identified significant aggravating or mitigating circumstances, (2) stated the specific reason why each circumstance is aggravating or mitigating, and (3) demonstrated that the factors have been weighed to determine that the aggravators outweigh the mitigators. Henderson v. State, 769 N.E.2d 172, 179 (Ind. 2002). The trial court did not follow this sentencing procedure. Therefore, we must remand for a sentencing statement regarding the sentence for child seduction as a class D felony.

b. *Letters*

Dowers also asserts as follows:

> It is well settled that sentencing is about determining the appropriate sentence by considering the nature of the offense and the character of the offender. Indiana Rule App. P. 7(B). The letters are clearly relevant to Mr. Dowers' character, and the trial court was required to at least read them.

Dowers' Br. 16.

We believe that in sentencing a defendant, the better practice is for the trial court to read the letters received in that regard on behalf of the defendant. Because we are remanding, we direct the trial court to read the letters, consider their content, and give them any weight deemed appropriate.

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recently held that the change constituted a substantive rather than procedural change that should not be applied retroactively. Weaver v. State, 845 N.E.2d 1066, 1072 (Ind. Ct. App. 2006), trans. denied.

We affirm Dowers' convictions but remand for a sentencing statement regarding the sentence for child seduction, as a class D felony, consistent with this opinion.

Affirmed and remanded.

VAIDIK, J., concurs.

RILEY, J., concurs in result.